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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID MARIO MARTINEZ,

Defendant and Appellant.

E070248

(Super.Ct.No. RIF1703011)

OPINION

APPEAL from the Superior Court of Riverside County. Eric G. Helgesen, Judge.
(Retired judge of the former Tulare Mun. Ct. assigned by the Chief Justice pursuant to
art. VI, § 6 of the Cal. Const.) Affirmed with directions.

David Mario Martinez, in pro. per.; Jennifer A. Gambale, under appointment by
the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, and A. Natasha Cortina and
Amanda E. Casillas, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant, David Mario Martinez, of assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1); count 2.)¹ The jury additionally found true an allegation defendant personally inflicted great bodily injury on the victim in defendant's commission of the count 2 offense. (§ 12022.7, subd. (a).) Defendant thereafter admitted suffering two prior prison terms (§ 667.5, subd. (b)), three prior serious felony convictions (§ 667, subd. (a)), and four prior strike convictions (§§ 667, subds. (c), (e)(2)(A), 1170.12, subd. (c)(2)). The court sentenced defendant to a determinate prison term of 19 years plus an indeterminate term of 25 years to life.

On appeal, defendant contends the matter should be remanded with directions to the trial court to consider whether, upon defendant's motion, the court should strike one or more of his section 667, subdivision (a) prior serious felony conviction enhancements.² The People concede the matter should be remanded. We remand the matter with directions. In all other respects, the judgment is affirmed.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² Appellate counsel initially filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case, a statement of the facts, and identifying two potentially arguable issues: (1) whether the court erred in allowing testimony regarding a prior act by defendant; and (2) whether the court erred by instructing the jury with CALCRIM No. 3472. Defendant was offered the opportunity to file a personal supplemental brief, which he did. In fact, defendant submitted two supplemental briefs. After we filed his first supplemental brief, we submitted the cause. Upon receipt of his second supplemental brief, we ordered submission of the cause vacated and directed the clerk to file defendant's second supplemental brief, which raised identical issues as his first supplemental brief. Defendant contended he acted in self-defense. Counsel later filed a motion to vacate submission, strike the *Wende* brief, and replace it with a new opening brief. We granted the motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

An employee at Carl's Jr. testified that on August 15, 2017, she was told to bring a bag of ketchup to defendant. Defendant told her she was rude and to leave. She later heard defendant's voice while she was taking orders at the drive-through; he sounded angry. The employee identified defendant from a six-pack photographic lineup that day. The People played surveillance video footage of the inside of the restaurant that day; in it, an employee can be seen approaching defendant and giving him a bag. Later, defendant confrontationally approaches the counter and appears argumentative, so much so that security comes to stand directly behind defendant.

The victim testified he was waiting for a ride in the parking lot of a Carl's Jr. that day. Defendant took him by surprise by coming up so close to him that the victim believed defendant was going to kiss him. The victim said, "'What the fuck are you doing[?]'". The victim noticed defendant had a knife in his hands; he backed away from defendant. Defendant responded, "You're assed out." The victim fell down and defendant bent over and stabbed the victim in the lower part of his stomach. The victim testified he may have swung at defendant in self-defense after defendant came after him with the knife.

A witness testified she was at Carl's Jr. that day with her four kids. She saw two men fighting. Defendant started beating up the victim;³ defendant was the initial

³ The witness identified defendant from a six-pack photographic lineup a few weeks after the incident and identified him in court.

aggressor. Defendant had a knife in his hand. The victim attempted to defend himself; he backed away from defendant. The victim later came up to her and asked her to call the police. He then walked inside the Carl's Jr.

An officer responded to a call regarding an assault at Carl's Jr. Upon arrival, he was informed there was a subject inside whom had been stabbed. Once inside, the officer noticed the victim was bleeding profusely from his lower abdomen. The blood spilled out upon multiple tiles of the restaurant floor. The victim was in pain. Riverside fire personnel arrived and began rendering aid to the victim. A paramedic testified the victim told him he had been stabbed twice. The paramedic found two wounds on the victim, one on his leg and one on his abdomen. The victim "was bleeding quite a bit." "[T]he clothing were drenched with blood as well." The paramedic loaded the victim into an ambulance for transport to the hospital.

The victim blacked out and awakened in Riverside Community Hospital. Another officer was dispatched to the hospital. The second officer collected the victim's clothes, which were "blood soaked." A doctor informed the second officer the victim had sustained three, nonlife-threatening stab wounds: two in the right leg and one in the lower part of his stomach. The victim underwent surgery during which staples were placed on his wounds. Hospital personnel discharged the victim after three days. The victim testified he still suffered pain in the areas of the stabbings.

The first officer spoke to the witness and obtained a detailed description of defendant, which he conveyed to detectives. The lead detective assigned to investigate

the incident reviewed surveillance footage from the restaurant. On August 16, 2018, he put out a BOLO (be on the lookout) to the media and other law enforcement agencies with the suspect's description and pictures from a surveillance video; he started receiving responses to the BOLO that evening and the following morning. The detective interviewed the witness who identified defendant as the perpetrator from a six-pack photographic lineup. The detective obtained an arrest warrant for defendant. On August 23, 2018, the detective was notified that the Orange County Sheriff's Department had defendant in custody. Officers recovered a knife from defendant when he was arrested.

The People charged defendant by felony information with attempted, premediated murder (count 1; §§ 664, 187, subd. (a)) and assault with a deadly weapon (count 2; § 245, subd. (a)). The People additionally alleged defendant had personally inflicted great bodily injury (§§ 12022.7, subd. (a), 1192.7, subd. (c)(8)) and personally used a deadly weapon (§§ 12022, subd. (b)(1), 1192.7, subd. (c)(23)) in his commission of the offenses. The People also alleged defendant had suffered three prior prison terms (§ 667.5, subd. (b)), four prior serious felony convictions (§ 667, subd. (a)), and four prior strike convictions (§§ 667, subds. (c), (e)(2)(A), 1170.12, subd. (c)(2)).

The People filed a pretrial motion seeking to introduce evidence of defendant's prior commission of criminal threats and assault with a deadly weapon pursuant to Evidence Code section 1101, subdivision (b) to show defendant acted with the same intent in the instant case. The People alleged that defendant had pulled up to a person's car and threatened to pull her out by the hair. The individual's husband pulled up and

asked what was going on. Defendant pulled out a knife and asked the husband if he wanted to die.

At the hearing on the motion, defense counsel argued the evidence was more prejudicial than probative. The court ruled that it was “inclined to believe that it is admissible for the limited purpose of showing his intent, which is an element of Count 1 in the current case. And I would allow it to be used for that purpose with limit[ing] instructions.”

Amy Bender testified that on November 18, 2015, she was in her car in front of her condominium complex; her contractor was in another vehicle following her. Work was being done to the parking lot inside the complex, so they pulled out of the complex and parked on the street outside. Defendant was parked 50 yards ahead of her; he started coming forcefully after her, aggressively cursing her: “He was cursing at me, swearing at me, and telling me I was a fucking idiot. What the fuck was I doing, because he had to swerve off the road to avoid hitting me.” Defendant came within three feet of her.

Bender’s contractor got out of his car. Defendant asked him if Bender was his wife. The contractor “said yes in protection of me.” Defendant pulled out a knife and said, “Do you want to die today because I will cut you.” The contractor got back in his car. He started taking video and pictures; he called the police. Defendant left.

Defense counsel requested self-defense instructions. The People objected. After reviewing the witnesses’ testimony, the court granted the defense request for a self-defense instruction. The court gave the parties copies of the proposed instructions.

Defense counsel had no objection to the proposed instructions. The court instructed the jury with the CALCRIM Nos. 3470, 3472, and 3474 instructions on self-defense.

CALCRIM No. 3472 reads: “A person does not have the right to self-defense if he provokes a fight or quarrel with the intent to create an excuse to use force.”

The jury hung on count 1, as to which the court declared a mistrial. The court later dismissed count 1 and the attached allegation pursuant to the People’s motion. Defendant waived trial and admitted suffering two prior prison terms (§ 667.5, subd. (b)), three prior serious felony convictions (§ 667, subd. (a)), and four prior strike convictions. The court struck prison prior number 3 and dismissed prior serious felony number 4.

II. DISCUSSION

Defendant contends that in light of Senate Bill No. 1393’s amendment to section 1385, the matter must be remanded to the court to permit it to exercise its discretion as to whether one or more of defendant’s prior serious felony conviction enhancements should be stricken. The People concede the matter. We agree.

“On September 30, 2018, the Governor signed Senate Bill [No.] 1393 which, effective January 1, 2019, amends sections 667[, subdivision] (a) and 1385[, subdivision] (b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under the [previous] versions of these statutes, the court [was] required to impose a five-year consecutive term for ‘any person convicted of a serious felony who previously has been convicted of a serious felony’ (§ 667[, subd.] (a)), and the court ha[d] no discretion ‘to strike any prior

conviction of a serious felony for purposes of enhancement of a sentence under Section 667.’ (§ 1385[, subd.] (b).)” (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.)

“When an amendatory statute either lessens the punishment for a crime *or*, as Senate Bill [No.] 1393 does, ““vests in the trial court discretion to impose either the same penalty as under the former law or a lesser penalty,”” it is reasonable for courts to infer, absent evidence to the contrary and as a matter of statutory construction, that the Legislature intended the amendatory statute to retroactively apply to the fullest extent constitutionally permissible—that is, to all cases not final when the statute becomes effective. [Citations.]” (*People v. Garcia, supra*, 28 Cal.App.5th at p. 972.) “Senate Bill [No.] 1393 is ameliorative legislation which vests trial courts with discretion, which they formerly did not have, to dismiss or strike a prior serious felony conviction for sentencing purposes. [Citation.]” (*Ibid.*) “[I]t is appropriate to infer, as a matter of statutory construction, that the Legislature intended Senate Bill [No.] 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when Senate Bill [No.] 1393 becomes effective on January 1, 2019.” (*Id.* at p. 973.)

Here, defendant’s case is not final because it remains on appeal. Therefore, the proper remedy is to remand the matter to the trial court to permit that court to exercise its new-found discretion to either impose or strike the prior serious felony conviction enhancements.

III. DISPOSITION

The matter is remanded to the trial court with directions to exercise its discretion pursuant to sections 667, subdivision (a) and 1385, subdivision (b), as amended by Senate Bill No. 1393 effective January 1, 2019, as to whether to strike any or all of defendant's prior serious felony convictions. We express no view on how the court should exercise its discretion. In all other respects, the judgment is affirmed

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

MILLER
J.